

91-650

No.



Supreme Court U.S.

FILED

OCT 15 1991

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IN THE

# Supreme Court of the United States

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OCTOBER TERM, 1991

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THE MARYLAND CLASSIFIED  
EMPLOYEES ASSOCIATION, INC., ET AL.,  
*Petitioners,*

v.

WILLIAM DONALD SCHAEFER,  
GOVERNOR OF MARYLAND, AND  
THE STATE OF MARYLAND, ET AL.,  
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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J. EDWARD DAVIS,  
DAVIS & JENKINS,  
Suite 909,  
409 Washington Avenue,  
Towson, MD 21204,  
(301) 494-9000,  
Counsel for Petitioners.



## QUESTIONS PRESENTED FOR REVIEW

1. Whether increasing Maryland state employees' hours without a concomitant increase in salary constitutes an impairment of contract for the purposes of article 1, §10 of the United States Constitution.

2. Whether increasing the hours worked for Maryland state employees without a concomitant increase in salary was a reasonable and necessary impairment of contract under the circumstances.

### LIST OF PARTIES

A. Those parties listed in the caption of this case, and Denise Kable, Teresa Whitmore, Diana Phelps, and Romani Amenu-El, are Petitioners herein

B. The following parties were Appellees with Petitioners in the proceeding in the Court of Appeals for Maryland:

1. American Federation of State, County and Municipal Employees, Local 1027, and Employees Association, and Mildred Womble, Indra Pierce, Sylvia Seymour, Connie Powell, Mary Cox, Mary Hall, Nancy Brant, Sally Davies

C. Hilda Ford, Secretary of Personnel, for the State of Maryland

D. The Board of Regents of the University of Maryland System.

E. Donald N. Langenberg, Chancellor, University of Maryland.



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**OPINIONS BELOW**

The Per Curiam Opinion of the Court of Appeals of Maryland, appears at Appendix 1 (unreported).

The opinion of the Circuit Court for Anne Arundel County, unreported, appears at Appendix 4 (unreported).

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**Jurisdiction**

The opinion and judgment of the Maryland Court of Appeals was rendered in this case on July 17, 1991. This Petition for a Writ of Certiorari was filed within 90 days of July 17, 1991 as is required by 28 U.S.C §2101(c). Jurisdiction of the Supreme Court is evoked under the provisions of 28 U.S.C. §1257.

**STATUTES AND RULES INVOLVED**

1. United States Constitution,  
Article 1, §10:

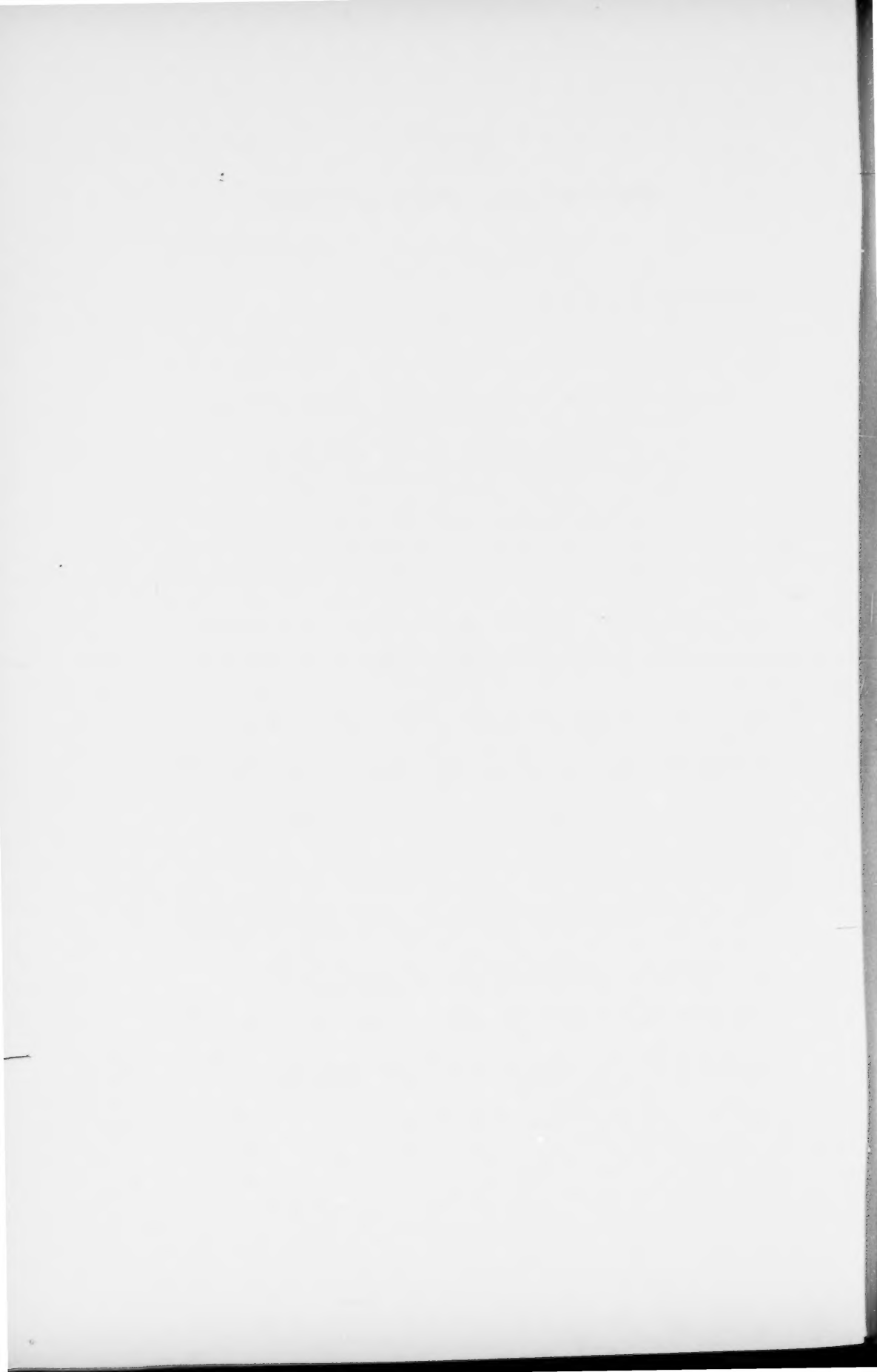
No state shall enter into any treaty, alliance, or confederations; grant letter of marque and reprisal; coin money; omit bills of credit; make anything but gold and silver coin tendered in payment of debts; pass any bill of attainder; expose facto law, or law impairing the obligation of contracts, or grant any title of nobility...  
(Full text at Apx. 23)

2. Annotated Code of Maryland,  
Article 100, §76 (full text at Apx.70).

3. Annotated Code of Maryland,  
art. 64 A, § 56. (full text at Apx.77).

4. Code or Maryland Regulations  
06.01.42A ( full text at Apx.79).

5. Code of Maryland Regulations  
06.01.01.14D (full text at Apx.84).



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**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF MARYLAND**

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## STATEMENT OF THE CASE

### A. THE PROCEEDINGS BELOW:

This action originated as a Complaint for Declaratory Judgment and Damages, brought by the Petitioners<sup>1</sup> in response to action taken by the Governor of Maryland in the form of an Executive Order. Through Executive Order 01.01.1991.15, the Governor of Maryland increased the work week from thirty-five and one half hours to forty hours for roughly 33,000 employees of the State of Maryland, without any additional salary. In May 1991, Petitioners filed suit in the Circuit Court for Anne Arundel County, Maryland alleging a taking of property in violation of the United States Constitution, 14th Amendment,

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<sup>1</sup>This action was originally styled as a class action on behalf of all similarly-situated state employees. By agreement of counsel, this action proceeded on behalf of the individually-named Petitioners only.

violation of their civil rights, specifically the United State Constitution, 5th Amendment and Article 1, §10 of the United States Constitution, along with violations of Maryland law, rules and regulations. Petitioners raised the constitutional question in this case in their Complaint at p.12, ¶37, and Count five of their Complaint.

Plaintiffs filed a Motion for Summary Judgment on June 7, 1991 and on June 19, 1991 a companion suit and motion to consolidate was filed by the American Federation of State County and Municipal Employees, et al. which was later consolidated with the original action.

Argument was held on the motions and cross motions for Summary Judgment on July 1, 1991, and on July 9, 1991 Judge Raymond Thieme, Jr. of the Circuit Court for Anne Arundel County issued a Memorandum and Order finding against the

Plaintiffs on all grounds, including a finding that if the State had created a contract with a future guarantees of wages it would have surrendered a essential element of sovereignty, and hence the executive Order did not violate any contract or constitutional rights of the Plaintiffs.

Immediately after that holding, Petitioners filed a Petition for Writ of Certiorari with the Maryland Court of Appeals. That Petition also raised the issue of constitutional impairment of contract. By agreement of the parties and after consultation with the Chief Judge of the Maryland Court of Appeals, the case proceeded on an expedited basis, and a hearing was held before the Maryland Court of Appeals on July 16, 1991, pursuant to the Writ. In argument before the Maryland Court of Appeals the issue of impairment of contract was raised and

argued. On July 17, 1991 a Per Curiam Order was issued by Chief Judge Robert Murphy affirming the decision of the Circuit Court for Anne Arundel County and stating that an Opinion was to be filed later.

**A. STATEMENT OF RELEVANT FACTS:** <sup>2</sup>

Petitioners are all classified employees of the State of Maryland each of whom is employed by a state agency under the Executive branch of state government. Each Petitioner has worked for the state for many years, e.g. Denise Kable - 22 years, Teresa Whitmore - 21.5 years, Rommani Amenu-El - 6 years. Each of the Petitioners have worked 35 1/2 hours per week since the inception of their employment with Maryland. At the time of the inception of this suit, each of the Petitioners worked in an agency

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<sup>2</sup> A stipulation of fact appears in Appendix 25 .

with a designated 35 1/2 hour work week, with overtime benefits accruing at a straight time rates for hours worked between 35 1/2 and 40 hours per week with time and one half-benefits for hours worked in excess of 40 hours per week, pursuant to the Annotated Code of Maryland, art. 100, §76 and the Code of Maryland Regulations ("COMAR"). All had received overtime benefits in accord with this plan. The 35 1/2 hour work week had been in force for state departments generally since September, 1945; institutional employees other than office workers had a work week of 40 hours effective May 14, 1956 and did not receive overtime compensation unless they had worked in excess of 40 hours. Those institutional employees are not a part of this action.

On February 27, 1991 the Governor issued Executive Order 01.01.1991.15

(Apx. 68), declaring "...the normal work week for state employees shall be 40 hours effective . . . July 1, 1991." There was no legislative finding of a fiscal crisis or emergency, and the Executive Order merely recited that "...during these difficult fiscal times it is prudent to search for savings for the taxpayers of this state.

At the time the Executive Order was promulgated, Maryland Law provided that

Except as otherwise provided in this section, every state employee who works in excess of the normal work week for his department, bureau board, commission or agency shall receive extra compensation for such hours worked in excess of that time. The amount of compensation for such excess shall be computed in the following manner:

1. Payment for time worked in excess of the positions normal work week but not in excess of 40 hours shall be made at the employee's usual hourly rate or rates.

Annotated Code of Maryland, art. 100,

§76. Each of the Petitioners worked for any agency that had a normal work week of 35 1/2 hours per week. This work week is designated by the appointing of authority, pursuant to COMAR "The appointing authority shall designate the work week for all positions under the appointing authorities control, and shall file the designation with the Secretary. The designation of the work week hours is effective until the appointed authority changes it." COMAR 06.01.10.42A

Pursuant to the Executive Order the appointing authorities for each agency changed the normal work week designation from 35 1/2 hours to 40 hours.

Each of the Petitioners has subsequently been required to work forty hours per week without additional compensation for the time worked between 35 1/2 hours and 40 hours.

Petitioner's request for relief has

been denied by both the Circuit Court for Anne Arundel County, and the Maryland Court of Appeals.



## ARGUMENT

### A. Introduction

Petitioners are all state employees whose benefits and compensation are prescribed by Maryland law and regulation. These laws and regulations constitute a contract, enforceable by the Petitioners through a grievance procedure available under Maryland law, and a waiver of sovereign immunity on employment issues. There is little question that a state may impair contracts, particularly when those contracts touch upon essential attributes of a state's sovereignty. On the other hand, purely financial obligations - such as the purely financial obligation to compensate state employees - do not automatically fall within the reserved powers doctrine, and are subject to close scrutiny by the courts. These contracts can be modified by state legislatures,

but to pass constitutional muster, must be both reasonable and necessary to serve an important public purpose; they must not merely cost saving measures. United States Trust Company v. New Jersey, 431 U.S. 1, 26-26; 97 S.Ct. 1505 (1976).

The work week for state employees in this case was increased without a proportionate increase in salary in the face of a statute requiring additional compensation for additional work. The purpose of this measure was purely fiscal, made without the benefit of any legislative determination of a fiscal emergency or crisis, and was neither reasonable nor necessary under any standards previously set out by this Court. For the reasons detailed below, this case merits the review by this Court

**B. AN ENFORCEABLE CONTRACT EXISTED  
BETWEEN MARYLAND AND ITS'S EMPLOYEES**

Analysis of contract clause violations necessarily begins with the inquiry of whether a contract exists. United State Trust Co., v. New Jersey, 431 U.S. 1 at 17, 97 S. Ct. 1505 (1977). In general, a statute is treated as a contract where the language and the circumstances evince a legislative intent to create a private right on a contractual nature enforceable against the state. United States Trust, 431 U.S. at 19, n.17.

The Annotated Code of Maryland, art. 100, §76 provides: "Except as otherwise provided in this section, every state employees who works in excess of the normal work week for his department, bureau, board, commission or agency shall receive extra compensation for such hours worked in excess of that time." art. 100

§76. The Code of Maryland Regulations defines "work week" as "... five work days, and at least 35 1/2 hours up to a maximum of 40 hours." COMAR 06.01.01.42A(1)(a). The Appointing Authority has the power to designate the length of the work week. Prior to the Governor's Executive Order changing the work week from 35 1/2 hours to 40 hours, each of the Petitioners had been hired, had worked and had been compensated on the basis of a 35 1/2 hour work week. Each of the appointing authorities for the Petitioners had designated 35 1/2 hours as the applicable work week for their respective agencies which remained in effect until the Governor's Executive Order changing that designation.

The statute requiring payment for hours worked between the normal work week and 40 hours demonstrates a legislative intent to create an enforceable right in

the Petitioners. Specifically, it is found in the portion of the Maryland Code entitled "Work, Labor and Employment" which establishes a broad system of rights protecting all Maryland citizens, including state employees. Md. Ann. Code, art. 100, et. seq. By statute, Maryland has waived sovereign immunity for cases involving the personnel policy, rules and regulations for Classified employees. Md. Ann. Code art. 64A, §56.

Each of the Petitioners was offered and accepted a position--in which they would earn full salary and benefits in exchange for working 35 1/2 hours per week. Each has received overtime and compensatory time for those hours worked between 35 1/2 and 40 hours. These laws and regulations, the Petitioners' bargained for exchange and the state's practices and policies over the last several decades create a private right of

a contractual nature enforceable against the state, as described by this Court in United States Trust Company v. New Jersey, 431 U.S. at 17, n.14.

**C. INCREASING THE WORK WEEK IMPAIRED PETITIONERS' CONTRACT RIGHTS**

The contract clause prohibits some impairments of contractual obligations by the states; necessarily, the limitations of the contract clause must be balanced against the "essential attributes of sovereign power necessarily reserved by the states to safeguard the welfare of their citizens. U.S. Trust Company, at 21, quoting Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 435, 54 S.Ct. 231 (1934) While a state has the power to legislate in areas of public concern, that state power must be consistent with the fair intent of the constitutional limitation of that power. U.S. Trust Company, Id., Blaisdell, 290

U.S. at 439.

When a state seeks to impair its own contract the court must carefully examine the nature of that impairment.

The initial inquiry concerns the ability of the state to enter into an agreement that limits its power to act in the future. As early as Fletcher v. Peck, the Court considered the argument that "one legislature can not abridge the powers of the succeeding legislature." 6 Cranch, at 135. It is often stated that "the legislature can not bargain away the police power of a state." Stone v. Mississippi, 101 U.S. 814, 817 (1880). (Footnote omitted) This doctrine requires a determination of the state's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. In short, the contract clause does not require a state to adhere to a contract that surrenders an essential attribute to its sovereignty. U.S. Trust, 431 U.S. at 23.

Purely financial obligations are generally not regarded as falling into

the category of "reserved powers". While the powers of eminent domain and police powers can not be contracted away, the power to enter into effective financial contracts can not be questioned.

Any financial obligation could be regarded in theory as a relinquishment of the state spending power, since money spent to repay debts is not available for other purposes. Similarly, the taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the court has regularly held that the states are bound by their debt contracts.

United States Trust, 431 U.S. at 24.

(Footnote omitted) Purely financial obligations do not automatically fall within the reserved powers, and do not receive protection as one of the state's immutable rights. U.S. Trust at 25, n.23. Employment benefits, including have been held to fall been found to fall within the reserved powers Maryland State Teachers Association v. Hughes, 594 F.



Supp. 1353, 1362 (1984); cf. cost of living increase for state employees not within reserved powers. Sonoma County v. County of Sonoma, 591 P.2d 1, 154 Cal. Reprtr. 903 (1979).

The contract clause is not an absolute bar to modifications of a state's financial obligations and impairments may be constitutional if they are reasonable and necessary to serve important public purposes, however, complete deference to legislative assessments of reasonableness and necessity are not appropriate when a state's self interest is at stake. "If a state could reduce its financial obligations whenever it wanted to spend money for what it regarded as an important public purpose, the contract clause would provide no protection at all." U.S. Trust, 431 U.S. at 25-26. In sum, to sustain an impairment of its own

contract, a state must demonstrate:

1. That the impairment was the result of a legislative exercise of the police powers;
2. That the impairment was reasonable; and
3. That the impairment was necessary to serve an important public purpose.

Analysis of contract impairment is also governed by the gravity of the harm. "The severity of the impairment measures the height of the hurdle the state legislature must clear." Allied Structural Steel Company v. Spannaus, 438 U.S. 234, 245, 98 S.Ct. 2716 (1978). Interference with employment benefits have been determined to be substantial impairments of the contract, Sonoma County v. County of Sonoma, 591 P. 2d. at 7 . "An increase in wages is frequently the very heart of an employment contract;

other provisions, including those relating to fringe benefits, are inextricably interwoven with those relating to wages, since employees may surrender various employment benefits in exchange for a wage increase." Id. As in Allied Structural Steel, the harm here is immediate, permanent and severe - the Petitioners are losing additional salary now, are required to remain on the work site or face termination, and there is no expiration date for the Governor's Order.

**D. THE IMPAIRMENT OF PETITIONERS' CONTRACT RIGHTS WAS NEITHER REASONABLE NOR NECESSARY TO SERVE AN IMPORTANT PUBLIC PURPOSE**

This Court has struck the balance between state's sovereignty and the protections of the contract clause by holding that legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions of a character

appropriate to the public purpose justifying its adoption. U.S. Trust Company at 22, quoting Home Building & Loan Association v. Blaisdell, 290 U.S. 398 at 445-447 (1934). Typically, courts interpreting this standard have looked to the circumstances requiring the legislature to act and have deemed persuasive legislative findings regarding the existence of an emergency, and whether the relief was limited in time and scope to deal with the necessities at hand Blaisdell 290 U.S. at 238; W.B. Worthen Company v. Thomas, 292 U.S. 426, 432-434, 54 S.Ct. 816 (1934). While the declaration of an emergency with strict limitations on duration are not absolute requirements to assess the reasonableness of legislation, " . . . the existence of an emergency and the limited duration of a release measure are factors to be assessed in determining the

reasonableness of an impairment, but they cannot be regarded as essential in every case." U.S. Trust Company at 23, n.19.

What is critical in this examination is identifying legislative action to establish the need for the impairment and a determination of whether or not the legislation fairly meets that need. What is particularly important in this case is that there was no legislative determination of an emergency or particular need. While it is undeniable that at the time these changes were made Maryland was in the process of making budget reductions, there no declared emergency as in Blaisdell, but rather the Executive Order promulgated by the Governor stated that its purpose was to achieve "cost containment through increase productivity and employee development" and because " . . . it is prudent to search for savings for the

taxpayers of this state." (Apx. 68)

Aside from problems of separation of powers, the increase in hours without a proportionate increase in pay constitutes an impairment of contract, unlimited in scope and duration, without any legislative, or other, determination of an emergency or extreme circumstances. It is simply a situation as described by this Court in United States Trust where the state, by virtue of the Governor's action, is refusing to meet its legitimate financial obligations simply because it would prefer to spend the money to promote public good rather than the private welfare of its creditors; if the State of Maryland could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, contract laws would provide no protection at all. U.S. Trust at 26, 29. There was no

legislative finding, factual presentation or judicial determination of an emergency in this case: The impairment of contract in this case is simply the result of a desire to spend money elsewhere.

Beyond a legislative determination of the need for impairment, the reasonableness and necessity of the action must be viewed independently. In prior cases, this Court has examined whether an impairment was reasonable, based on its limitation in duration and degree, e.g. W.B. Worthen Co. v. Thomas, 292 U.S. 426, (1974) where the legislation was struck down because of the lack of limitations as to time amount circumstance of need. Similarly in Treigle v. Acme Homestead Association, 297 U.S. 189, 56 S.Ct. 408 (1936) this Court held that the legislation impaired obligations of contract because the legislation was neither "temporary or

conditional." Treigle 297 U.S. at 195. Conversely, impairments have been sustained where the limitations were temporary and conditional. Blaisdell, 290 U.S. at 444-445.

In this instance the impairment is neither temporary nor conditional. The Governor's Executive Order is absolute in its requirements, is in no way temporary excepting by the Governor's unilateral determination that the hours should be changed.

Independent of a determination of reasonableness, courts have also looked to a determination of necessity for the impairment. This analysis requires a review of whether less drastic measures could have achieved the same result and whether, without modifying its obligations at all, a state could have adopted alternative means of achieving its goals. U.S. Trust at 29-30. The



states goal in this situation - saving money - could certainly be achieved by a variety of other means. Indeed, there is a significant question in this case whether increasing the work week without increasing salary saves any money at all. Increasing in the work week logically increases productivity but salaries and spending do not decrease; perhaps there is some savings achieved by the increase in productivity, but the record in this case is devoid of any specific finding of savings. Rather the Secretary of State, in a letter to Senator C. Jemino on an inquiry regarding these purported savings, stated "...it is certainly logical to conclude that savings will result from each of the categories mentioned in the second paragraph above but it is not possible to quantify them until the detailed study is conducted of each position."

This absence is the result of the lack of any legislative findings or determinations at all on these issues and merely points out the principle that the Executive Order was not reasonably calculated to meet an important public purpose. Obviously, there are many alternative means to save money in state government, including decrease in capital spending, reduced public services, temporary furloughs of state employees, etc.; unfortunately because of the lack of any detailed action by the legislature or any other branch of state government, the alternatives have been simply unexplored by the State of Maryland.

#### CONCLUSION

The court should grant a Writ of Certiorari to the Maryland Court of Appeals to resolve the important constitutional question in this case: whether a state may impair the contract

of its employees, without a finding that an important public purpose is being met, and whether the increase in hours without additional salary is reasonable and necessary under the circumstances. On the issue of the extent to which a state may be impair its employees' contracts, there is great disparity among and between the federal and highest state courts. Maryland State Teachers Association v. Hughes, 594 F. Supp. 1353 (1984) finds that changes to pension benefits do not constitute an impairment of contract. The Court of Appeals of New York has determined that the state, in the exercise of its police power, may override provisions of a collective bargaining contract, Subway Surface Supervisors v. New York Transit Authority, 375 N.E. 2d, 384, 44 N.Y. 2d 101 (1984); but the Supreme Court of California has ruled that legislation

eliminating cost of living increases by localities constitutes a severe impairment of its employees' rights. Sonoma County v. County of Sonoma, 152 Cal.Rptr. 903, 591 P. 2d 1 (1979). The United States Court of Appeals for the First Circuit has held that legislation affecting previously negotiated collective bargaining agreement did not violate the contract clause. Local Division 589, etc. v. Commonwealth of Massachusetts, 666 F.2d 618, 641 (1981).

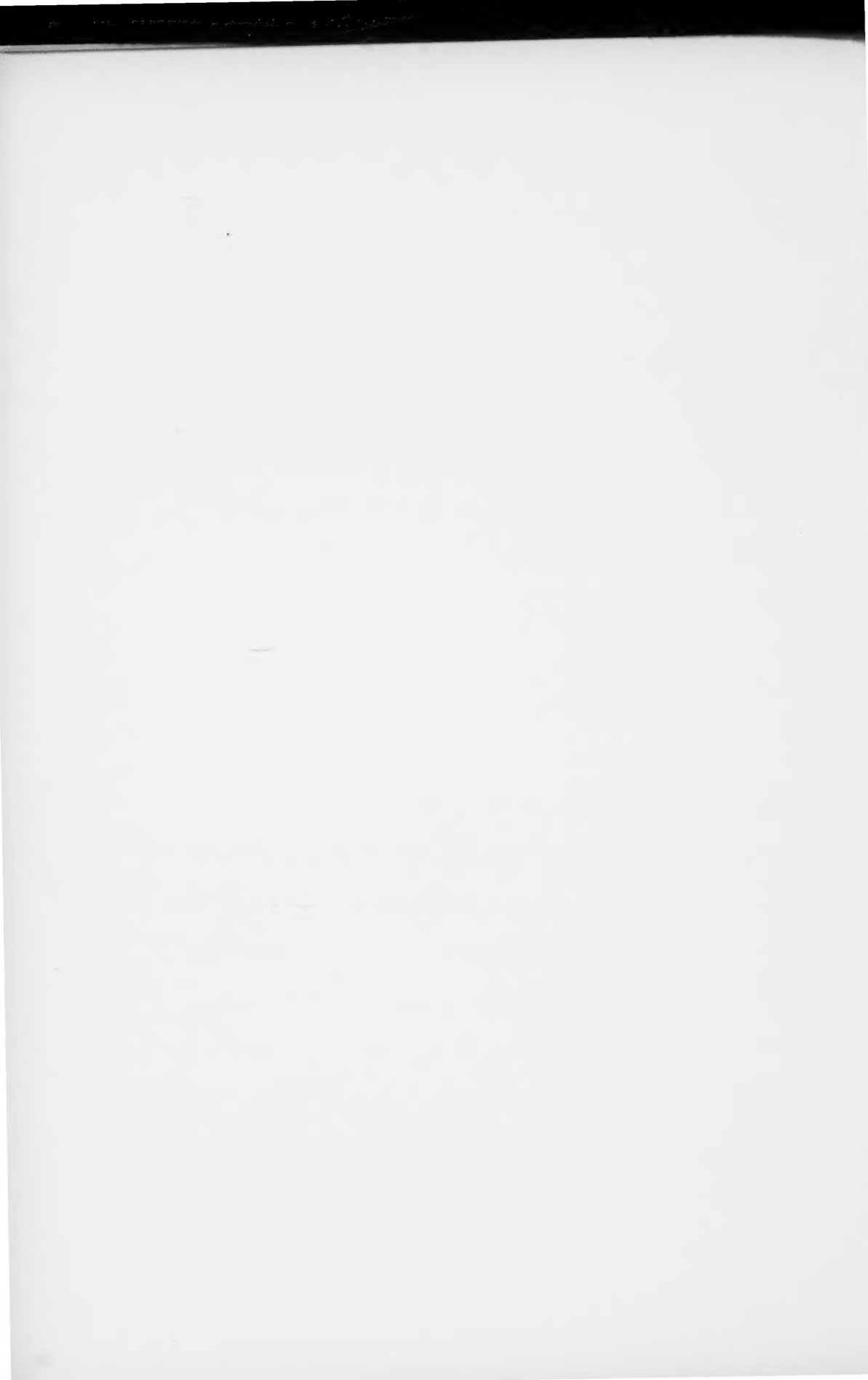
In view of the lack of any legislative findings regarding a fiscal crisis, the apparent unreasonableness and absence of necessity for the actions taken, as well as the disparity among the courts of this land, this case cries out for review.

Respectfully Submitted,

*J. Edward Davis*

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J. EDWARD DAVIS  
Davis & Jenkins  
409 Washington Avenue  
Suite 909  
Towson, Maryland 21204  
(301) 494-9004



IN THE COURT OF APPEALS OF MARYLAND

No. 50

September Term, 1991

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MARYLAND CLASSIFIED EMPLOYEES  
ASSOCIATION, INC. et al.

and

AMERICAN FEDERATION OF STATE,  
COUNTY, AND MUNICIPAL EMPLOYEES,  
COUNCIL 92, MARYLAND STATE EMPLOYEES  
UNION et al.

v.

GOVERNOR WILLIAM DONALD SCHAEFER  
et al.

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Murphy, C.I.  
Eldridge  
Rodowsky  
McAuliffe  
Chasanow  
Karwacki  
Bell, JJ.

---

PER CURIAM ORDER

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Filed: July 17, 1991

APX. 1.

IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

THE MARYLAND		
CLASSIFIED	*	No. 50
EMPLOYEES		
ASSOCIATION,	*	SEPT. TERM,
INC., et al.		
	*	1991
and		
	*	
AMERICAN FEDERATION		
OF STATE, COUNTY,	*	
AND MUNICIPAL		
EMPLOYEES, COUNCIL	*	
92, MARYLAND		
STATE EMPLOYEES	*	
UNION, et al.		
	*	
V.		
	*	
GOVERNOR WILLIAM		
DONALD SCHAEFER	*	
et al.		
	*	

PER CURIAM ORDER

For reasons to be stated in an  
opinion to be filed, it is this 17th day  
of July, 1991

ORDERED, by the Court of  
Appeals of Maryland, that the judgment of  
the Circuit Court for Anne Arundel County  
be, and it is hereby, affirmed. Costs in  
this Court and in the Circuit Court for



Anne Arundel County to be paid by the  
Petitioners. Mandate to issue forthwith.

/s/Robert C. Murphy  
Chief Judge

APX. 3.

IN THE CIRCUIT COURT FOR  
ANNE ARUNDEL COUNTY

MARYLAND CLASSIFIED	*	Case No.
EMPLOYEES ASSOCIATION,		
INC., et al.	*	3116305

Plaintiffs	*
------------	---

V.	*
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WILLIAM DONALD	*
SCHAEFER, et al.	

Defendants	*
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* * *	*	*	*
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AMERICAN FEDERATION		
OF STATE, COUNTY AND	*	Case No.
MUNICIPAL EMPLOYEES		
COUNCIL 92, et al.	*	3116596

Plaintiffs	*
------------	---

V.	*
----	---

WILLIAM DONALD	*
SCHAEFER, et al.	

Defendants	*
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MEMORANDUM OF OPINION AND ORDER

A hearing was held on Tuesday, July  
2, 1991, on cross motions for summary

judgment in this consolidated action<sup>1</sup>. Extensive memoranda have been submitted, stipulations have been entered and arguments were heard. Upon due consideration of the issues and arguments presented, this Court holds that there is no dispute as to any material issue of fact in this case and that as a matter of law the Defendant's motion for summary judgment must be granted for reasons that follow.

**A. FACTS**

On January 8, 1991, Governor William Donald Schaefer issued Executive Order 01-01-1991-01. That order provided that "the normal work week for State employee

APX. 5.

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<sup>1</sup>These cases were consolidated on motion of Plaintiff, AFSCME, by agreement between the parties and the court and by Order of this court signed on July 1, 1991.

be shall be 40 hours effective February 6, 1991 and that "the Secretary of Personnel and the appointing authorities shall take all actions necessary or desirable to implement this directive."<sup>2</sup> The effect of this order was to increase the work week from 35 1/2 hours to 40 hours for an estimated 38,700 employees. The Plaintiffs argue that the Governor's action was improper and unlawful under a number of theories:

I. Separation of Powers

II. Implied Contract

III. Pay Plan Procedure

IV. Procedural Due Process.

**B. COURT'S OPINION**

APX. 6.

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<sup>2</sup>This Order was stayed by the Governor on February 6, 1991 and later amended by Executive Order 01.01.1991.15 on February 27, 1991 wherein the effective date was changed from February 6 to July 1, 1991.

## **I. SEPARATION OF POWERS**

Plaintiff, Maryland Classified Employees Association (MCEA), argues that any attempt through an Executive order to change the work week would be an unconstitutional legislative act by the Governor. The basis for their position is twofold: 1) the Governor is not specifically authorized by the constitution to 2) the legislature has mandated that the work week is to be 35 1/2 hours and that any time worked in excess of that amount, up to 40 hours, is to be Compensated at the employee's usual rate and the action taken by the Governor is directly contrary to that mandate.

The first contention is easily disposed of by virtue of the fact that the Governor is specifically authorized, through the legislative grant of authority to the Secretary of Personnel, to control virtually all aspects of employment

including the work week for State, employees in the Executive branch. The Governor is the head of the Executive branch of government and authorized to direct and supervise the officers of that branch.<sup>3</sup> The Secretary of Personnel is an officer of the Executive branch and is appointed by and serves at the discretion of the Governor. The legislature has given this particular officer extremely broad power in matters concerning State personnel. Article 64A, §11 of the Annotated Code of Maryland provides that "It shall be the duty of the secretary to carry out the provisions of this Article, and to make such rules as he deems necessary or proper to that end. Such rules may be abolished, added to, changed or amended, and all such rules shall have

APX. 8.

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<sup>3</sup>State Government Article, section 3-302, Annotated Code of Maryland.

the force and effect of law." Clearly, this grant of authority is broad enough to encompass something as basic as the number of hours in a work week. Thus, through his officer the, Secretary of Personnel, whom the Governor is empowered to direct and supervise, the Governor has authority to manipulate the work week. Furthermore the Plaintiff's assertion that Article 41, §3-401 does not encompass control over the State Employees work week is by necessity incorrect. The definition of an "Executive order" is broad and clearly must be read so as to allow the Governor to control and direct the officers over whom he is statutorily given control. Such breadth then will include the essential aspects of state employment such as hours in a work week.

MCEA's second position concedes that the Governor may have the power to take such action, but asserts that he cannot in

so acting interfere with existing law, There is no dispute that the Governor cannot by Executive Order undo what the legislature has done by statute, such action would be patently void and is not what has taken place in this instance. MCEA has seized upon Article 100, §76 of the Annotated Code of Maryland as the foundation from which to build this portion of their separation of power argument. While perhaps creative, this statute is not a sufficient foundation for such an argument. Article 100, §76 is a statute dealing with overtime compensation and provides in short that employees who work in excess of their normal work week, but less than 40 hours will-be compensated at the usual hourly rate. Time worked over 40 hours will be compensated at time and one-half. From this simple statute MCEA finds a legislative mandate that the work week is to be 35 1/2 hours and that



any time worked in excess of that time must be compensated. However, in light of the statutory history behind the "normal work week" and the clear meaning of Article 100, §76 this statute cannot be a mandate and does not preclude the Governor's action.

The primary reason for the Court's position is that the legislature in enacting such a statute is presumed to be aware of existing law and regulations including administrative regulations. Board of Education of Garrett County v. Lendo, 295 Md. 55 (1982); Maryland Port Administration v. Browner, 303 Md. 44, 60 (1985). In this instance there were regulations in existence that defined the "normal work week" to be not less than 35 1/2 hours and not more than 40 hours. Commissioner of Personnel's State Employees Personnel Rules, 42E. Had the Legislature intended a mandated 35 1/2

hour work week contrary to the existing regulations they could have provided so expressly. Therefore, since there is no mandate attached to Article 100, §76, MCEA's argument is meritless and the Governor's action is not in violation of the Doctrine of Separation of Powers. Furthermore, the Governor's action does not render the statute a nullity, for the statute remains perfectly valid unless the designation of the work week has been changed to 40 hours, as was done in this instance. The simple fact that the employees will not be able to take advantage of the statute does not render it a nullity since its usefulness was predicated upon the flexibility of the work week. In the future if the work week is reduced the statute will once again be controlling for hours worked in excess of the designated work week short of 40 hours.

## II. IMPLIED CONTRACT

MCEA's second argument is that the Governor's action is void as a violation of the Plaintiff's implied contract with the State. MCEA asserts that the Plaintiff s were hired with the understanding that the work week was 35 1/2 hours and for the.. past several decades have worked 35 1/2 hour work weeks in reliance on that understanding. They argue that the State should be estopped from altering that relied upon understanding. In this instance no such contract could have been created. The Plaintiffs assert that their work week cannot be adjusted, but it is clearly stated in COMAR 06.01.01.42A(1)(a)-(f) that the "appointing authority shall designate the work week for all. positions under the appointing authority's control, and shall file the designation with the secretary. The designation of work week

hours is effective until the appointing authority changes it.,, Further, COMAR provides that the work week consists of at least 35 1/2 hours up to a maximum of 40 hours. In the face of these regulations it is inconceivable that any implied contract purporting to fix the work week could be validly made. Plaintiffs cannot claim that their employment was not and is not subject to the rules under which they were hired and such rules clearly preclude any notion that the work week is unalterably fixed. Indeed, the regulations clearly contemplate a flexible work week within the range set subject to change by the appointing authority. Therefore, any implied contract must necessarily exist within the frame work of the existing rules and regulations, which in this instance preclude the implication of a fixed work week. Further, had such a contract that irrevocably fixed the length

of the work week in fact been created, it would be void since "it would have surrendered an essential element of the State's sovereignty". Maryland State Teachers Association v. Hughes, 594 F. Supp. 1353 (D.Md. 1984), Affirmed, No. 84-2213 (4th Cir. 1985), Cert. denied, 475 U.S. 1140 (1986). in Hughes the Court held that a contract which deals with the level of compensation for State employees is one that one legislature can not create to bind a subsequent legislature. Compensation it was held, involves clements of a State's sovereignty which may not be contracted away. Like compensation, the terms of employment for State employees must also be within that realm of Governor's powers which cannot be given away or lost by a lack of enforcement or use. Were such not the case, the State would find itself without the power to control the terms of

employment with its own employees simply by virtue of the fact that a sufficient amount of time has passed since the employee was hired.

### III. PAY PLAN PROCEDURE

Plaintiff, American Federation of State, County and Municipal Employees (AFSCME), raise the issue of the pay plan as a bar to the Governor's action. AFSCME asserts that the State's own salary plan requires that certain procedures and considerations are to be followed before employees salaries can be amended. However, before the pay plan argument can be used one must first assume that a change in the work week is a change in salary and that the other regulations as discussed above do not exist. The Court does not make such assumptions.

AFSCME argues that a change in the work week is a change in the salary plan. However, the State employees are

salaried employees who are paid based upon the classification that they hold and not hourly employees. Thus, a change in the number of hours worked does not alter the salary they make or the amount of money the state must pay out from the state treasury. To be sure, the net effect of working more hours for the same pay on the individual level is a decrease in hourly pay, but such a decrease in "calculated" pay is not what the pay plan procedures were implemented for. The pay plan is a budgetary creature and is concerned with the "actual" payroll. Since the pay plan is not in fact altered the procedures it requires are not at issue.

AFSCME's argument is further undercut by the fact that the regulations allowing the work week to be altered at such time as the appointing authority changes the designation contemplate a change at any time and not one limited to the

appropriate time in the pay plan procedure. To read into the pay plan what AFSCME would require would be to limit the otherwise clear and controlling regulations on work week designations.

#### IV. DUE PROCESS

Plaintiff, MCEA, alleges that the Governor's action represents, a "taking" of the "property" interests of the State employees in contravention of their Due Process rights. The assertion is made that by increasing the number of hours worked without increasing compensation, the Governor is depriving them of their right to compensation without the traditional safeguards of Due Process: notice, hearing and an opportunity to be heard. However, for this argument to succeed, Plaintiffs must show that there was in fact a "taking" of a constitutionally protected "property" interest.



Under the Supreme Court's decision in Board of Regents v. Roth <sup>4</sup> property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." <sup>5</sup> In Roth the Court looked to the contract of employment as the "rules or understanding" which may have created a "property interest" and the Court in Goldberg v. Kelly <sup>6</sup> looked to the statutory definitions as to eligibility to determine

APX. 19.

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<sup>4</sup>408 U.S. 564, 33 L Ed. 2d 548, 92 S. Ct. 2701 (1972)

<sup>5</sup>408 U.S. 564, 577.

<sup>6</sup>397 U.S. 245, 25 L. Ed. 2d 287, 90 S. Ct. 1011.

that the welfare recipients indeed had a "property interest". In this case we have the existing and controlling regulations that clearly define what the work week is and that it is subject to change at the discretion of the appointing authorities. Far from creating an entitlement, the work week regulations affirmatively deny the creation of any property interest in a 35 1/2 hour work week. <sup>7</sup>

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APX. 20.

<sup>7</sup>The Supreme Court in Perry v. Sindermann, 408 U.S. 593, 33 L Ed. 2d 570, 92 S. Ct. 2694 (1972) recognized that a prior course of dealing and the surrounding circumstances of employment could create an unwritten "common law" of that particular employment which might then rise to the level of a "property interest". However, the past conduct surrounding the employment of the Plaintiffs in this case can not displace the clear dictates of the controlling regulations that preclude the establishment of a fixed work week. See Perry, id., Footnote 7 at p. 602 where the

Therefore, since no property interest exists in this instance there can be no denial of Due Process.

ORDER

Now, Therefore, for reasons stated above, it is this 9th day of July, 1991, in the Circuit Court for Anne Arundel County,

ORDERED that:

1. The Defendant's Motion for Summary Judgment be, hereby, GRANTED;

2. The Plaintiffs' Motions for Summary Judgment are hereby, DENIED;

3. The Plaintiffs' request for injunctive relief is hereby, DENIED and

APX. 21.

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court states that "If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated."

4. Any and all further relief requested by the Plaintiffs is hereby, DENIED.

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RAYMOND G. THIEME, JR., JUDGE /s/

APX. 22.

CONSTITUTION OF THE UNITED STATES

Section 10.

(Restrictions upon Powers of States)

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title or Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent

of Congress, lay any Duty of Tonnage, keep  
Troops, or Ships of War in time of Peace,  
enter into any Agreement of Compact with  
another State, or with a foreign Power, or  
engage in War, unless actually invaded, or  
in such imminent Danger as will not admit  
of delay.

APX. 24.

THE MARYLAND \* IN THE  
CLASSIFIED \*  
EMPLOYEES \* CIRCUIT COURT  
ASSOCIATION, \*  
INC., et al. \* FOR

Plaintiffs \* ANNE ARUNDEL CO.

V. \* Case No. 3116305

WILLIAM DONALD \*  
SCHAEFER, \*  
et al. \*

Defendants \*

\* \* \* \* \*

AMERICAN \*  
FEDERATION OF \*  
STATE COUNTY \*  
AND MUNICIPAL \*  
EMPLOYEES \*  
COUNCIL 92, et al.

\* Case No. 3116596

Plaintiffs

V.

WILLIAM DONALD \*  
SCHAEFER, \*  
et al. \*

Defendants

\*

#### STIPULATIONS OF FACT

The parties agree to the following facts:

1. Diana Phelps has been a

classified employee of the State of Maryland for 17 years, and Is presently employed by the state as a Services Supervisor I within the Department of Transportation/Maryland Aviation Administration. Ms. Phelps is a member of the Maryland Classified Employees Associations. ("MCEA").

2. Theresa Whitmore has been a classified employee of the State of Maryland for 21.5 years, and is currently employed by the State of Maryland as an Office Secretary I within the Department of Health and Mental Hygiene. Ms. Whitmore is a member of MCEA

3 . Carol Kelly-Nesbitt has been a classified employee of the State of Maryland for 16 years , and is currently employed by the state as an Office Secretary II within the Department of Health and mental Hygiene. Ms. Kelly-Nesbitt is a member of MCEA.



4. Denise Kable has been a classified employee of the State of Maryland for 22 years, and is employed by the state as a Public Affairs Specialist III within the Department of Public Safety and Correctional Services. Ms. Kable is a member of MCEA.

5. Rommani Ammenu-El has been a classified employee of the State of Maryland for six years, and is currently employed by the state as a Support Enforcement Assistant IV within the Department of Human Resources. Mr. Ammenu-El is a member of MCEA.

6. Mildred Womble has been a classified employee of the State of Maryland for over 19 years. She is employed as a Cashier II with the Motor Vehicle Administration, Department of Transportation. Ms. Womble is a member of the American Federation of State, County and Municipal Employees Union ("AFSCME"),

Council 92.

7. Indra Pierce has been a classified employee for almost 12 years. She is employed as a Physical Therapist IV at the Rosewood Hospital Center, Department of Health and Mental Hygiene. Ms. Pierce is a member of AFSCME Council 92.

8. Sylvia Seymour has been a classified employee for almost 21 years. She is employed as an Income Maintenance Specialist. She is a member of III by the Department of Human Resources. AFSCME Council 92.

9. Connie Powell has been a classified employee for almost six years. She is employed as an Office Clerk 11 by the State Highway Administration, Department of Transportation. Ms. Powell is a member of AFSCME Council 92.

10. Mary Cox has been a classified employee for almost eight years. She is

employed as an Addiction Counselor III by the Wicomico County Health Department, Department of Health and Mental Hygiene. Ms. Cox is a member of AFSCME Council 92.

11. Mary Hall has been a classified employee of the University of Maryland System for over one year. She is employed as a Library Assistant I by the University of Maryland, Baltimore County. Ms. Hall is a member of AFSCME Council 92.

12. Nancy Brant has been a classified employee for over seven years. She is employed as an Office Secretary I by the Thomas B. Finan Center. Ms. Brant is a member of AFSCME Council 92.

13. Sally K. Davies has been a classified employee of the University of Maryland for over 17 years. She is employed as an Office Supervisor III at the University of Maryland, University College, University of Maryland System. Ms. Davies is president of AFSCME Local

1072.

14. On January 8, 1991, Governor William Donald Schaefer issued Executive Order 01.01.1991.01.

15. On February 6, 1991, Governor Schaefer suspended Executive Order 01.01.1991.01.

16. On February 27, 1991, Governor Schaefer issued Executive Order 01.01.1991.15.

17. 33,438 State employees in the executive branch work 35 1/2 hour work weeks, 21,175 state employees in the executive branch work 40 hour work weeks. In the University of Maryland System, 5,083 employees presently work 40 hours per week and 5,262 employees work fewer than 40 hours per week.

18. Presently, employees of the Maryland executive branch and in the University of Maryland System whose work weeks have been designated as 35 1/2 hours

earn, when approved by the appropriate supervisor, cash overtime or compensatory leave for hours worked In excess of 35 1/2 hours per week.

19. Each of the named plaintiffs, with the exception of Diana Phelps during her employment as a correctional officer, has worked 35 1/2 hour work weeks since the Inception of their employment with the State.

20. Exhibits B through E, attached to the complaint of Plaintiffs MCEA, et al. are true and correct documents and accurately state the present policies of the identified agencies regarding the work weeks and overtime compensation applicable to the employees to whom the documents are addressed.

21. Employees in the merit system are paid on an annual salary basis.

22. All appointing authorities in the merit system have filed with Secretary

of Personnel Hilda E. Ford work week designations of 40 hours for all of their employees, effective in July 1991, pursuant to the request of Secretary Ford of May 3, 1991.

23. There are 442 classifications in the merit system containing positions in which employees work between 71.0 and 80 hours per two week pay period. In those classifications, 8,408 employees work 40 hour work weeks and 19,713 work 35 1/2 hour work weeks.

24. In establishing the rates of pay for the classification in the State Salary Plan, the hours worked by employees are not taken into consideration.

25. Employees with designated normal work weeks of 40 hours receive the same salaries as employees in the same classification whose normal work weeks are 35 1/2 hours.

26. On September 25, 1945, the Board

of Public Works approved a five day work week for State departments generally. The work weeks for such employees were 35 1/2 hours. The Board's action did not apply to State hospitals or Institutions.

27. On May 14, 1956, the Board of Public Works approved a proposal by the Commissioner of Personnel to establish a normal work week of 40 hours for institutional employees other than office workers and a normal work week of not less than 35 1/2 hours for Institutional office employees and employees of general state departments.

28. Rule 42E of the State Employees Personnel Rules, promulgated by the Commissioner of Personnel, provided between 1960 and 1970 that the normal work week for institutional employees other than office workers was 40 hours. Rule 42E also provided that for institutional office employees and all employees of

general state departments the normal work week consisted of not less than 35 1 /2 hours or more than 40 hours

29. Effective July 1970 the Secretary of Personnel amended Rule 42E to provide that based on the needs of the agency, an appointing authority could designate the normal work week for the various positions in the agency, which would consist of not less than 35 1/2 hours per week, nor more than 40 hours per week.

30. In 1986, when the State requested a comparable worth study, Booze Allen and Hamilton, Inc. adjusted the salaries studied to the same number of work week hours.

31. The Salary Survey performed by Local Government Personnel Association National Capital Area for FY 1990-1991, making comparisons of the University of Maryland System to other public sector



groups, was done on an hourly basis.

32. Secretary Hilda E.- Ford, reported no amendments to the pay plan to the General Assembly in January of 1991.

33. Exhibits I through 25 to Defendants' Motion for Summary Judgment are genuine, authentic, and, to the extent found relevant by this Court, admissible

34. Exhibits 1 though 6 of Plaintiffs AFSCME Council 92's and AFSCME Local 1072's Statement of Grounds and Authorities are genuine, authentic, and, to the extent found relevant by this Court, admissible.

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J. EDWARD DAVUS  
Davis & Jenkins  
409 Washington Avenue  
Mercantile Bldg. - Suite 909  
Towson, Maryland 21204  
(301) 494-9009

Attorney for Plaintiffs  
MCEA, et al.

---

WILLIAM H. ENGLEMAN  
Tenth Floor-Sun Life Building  
20 South Charles Street  
Baltimore, Maryland 21201

Attorney for Plaintiffs  
AFSCME, et al.

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JAMES F. TRUITT, JR.  
Principal Counsel  
Department of Personnel  
301 West Preston Street, Rm. 1009  
Baltimore, Maryland 21201  
(301) 225-4725

Attorney for Defendants

THE MARYLAND	*	IN THE
CLASSIFIED		
EMPLOYEES	*	CIRCUIT COURT
ASSOCIATION, INC.		
7127 Rutherford Rd	*	FOR
Balto., Md. 21207		
	*	ANNE ARUNDEL CO.
DIANA PHELPS		
345 Rambling	*	Case No.
Ridge Court		
Pasadena, Md. 21122	*	
TERESA WHITMORE	*	
23 East 9th Street		
Frederick,	*	
Maryland 21701		
	*	
CAROL KELLY-NESBITT		
P.O. Box 1319	*	
Salisbury, Maryland		21802
	*	
DENISE KABLE		
887 Century Street	*	
Hempstead, Maryland		21074
	*	
ROMMANI AMENU-EL		1405
Vida Drive	*	
Balto., Md. 21207		
	*	
Plaintiffs -		
Individually,	*	
and as Represen-		
tives of a Class of	*	
All Similarly-Situated		
State Employees	*	
V.	*	

WILLIAM DONALD \*  
SCHAEFER, GOVERNOR OF \*  
MARYLAND \*  
State House  
Annapolis, Md 21401 \*  
\*

and

THE STATE OF MARYLAND \*  
State House \*  
Annapolis, Maryland  
21401 \*

and

HILDA E. FORD \*  
Secretary of \*  
Personnel \*  
301 W. Preston St.  
Room 609 \*  
Balto, Md. 21201 \*  
\*

SERVE ON:

Judson P. Garrett, \*  
Jr. \*  
Office of the  
Attorney General \*  
200 St. Paul Place  
Baltimore, Maryland \*  
21202  
On Behalf of All \*  
Defendants  
\*

**COMPLAINT FOR DECLARATORY  
JUDGMENT AND DAMAGES**

Plaintiffs, The Maryland Classified  
Employees Association, Inc., Diana Phelps,  
Teresa Whitmore, Carol Kelly-Nesbitt,

Denise Kable and Rommani Amenu-El, individually, and as representatives of a class of all similarly situated State employees ("Plaintiffs"), by their attorneys, J. Edward Davis, J. Calvin Jenkins, Jr., Stephen B. Awalt and Davis & Jenkins, bring this action against the Defendants, and in support thereof state:

**I. INTRODUCTION**

On February 27, 1991, Governor William Donald Schaefer issued Executive Order 01.01.1991.15 (the "Order") requiring State employees to work a 40 hour workweek, effective July 1, 1991 (Exhibit A). The Order assumes that State employees do not work a 40 hour workweek, that increasing the workweek will lower State expenditures for labor, that State employees do not work as hard, or as long as employees in the private and federal sector, and that State employees are unwilling or unable to protect themselves

from the unilateral disruption of their employment rights by the Governor. Because State employees are currently required to be at the work place at least 40 hours per week, because they often work more than the hours required, because increasing the length of the work week will cost the State more money in salary payments, retirement earnings and benefits accumulation, and because State employees are empowered by law to seek redress from the devaluation of their work, this action. is brought to require.the State of Maryland, the Governor of Maryland, and the Secretary of Personnel to honor the laws, rules, regulations and policies governing the State as an employer.

## **II. FACTS COMMON TO ALL COUNTS**

1. The Maryland Classified Employees Association, Inc. is an employee association, representing over twenty--eight thousand active and retired state

and local government employees throughout the State of Maryland. Each of the named Plaintiffs is a member of the Maryland Classified Employees Association, Inc.

2. Plaintiff Diana Phelps has been a classified employee of the State of Maryland for 17 years, who will be required to work 40 hours for 35 and 1/2 hours' pay by virtue of the Order. Diana Phelps is employed by the State as a Customer Service Representative within the Department of Transportation - Maryland Aviation.

3. Plaintiff Teresa Whitmore has been a classified employee of the State of Maryland for 21.5 years, who will be required to work 40 hours for 35 and 1/2 hours' pay by virtue of the Order. Teresa Whitmore is employed by the State as an Office Secretary I within the Department of Health and Mental Hygiene.

4. Plaintiff Carol Kelly-Nesbitt has

been a classified employee of the State of Maryland for 16 years, who will be required to work 40 hours for 35 and 1/2 hours' pay by virtue of the Order. Carol Kelly-Nesbitt is employed by the State as an Office Secretary II within the Department of Health and Mental Hygiene.

5. Plaintiff Denise Kable has been a classified employee of the State of Maryland for 22 years, who will be required to work 40 hours for 35 and 1/2 hours' pay by virtue of the Order. Denise Kable is employed by the State as a Public Affairs Specialist III within the Department of Public Safety and Correctional services.

6. Plaintiff Rommani Amenu-El has been a classified employee of the State of Maryland for 6 years, who will be required to work 40 hours for 35 and 1/2 hours' pay by virtue of the Order. Rommani Amenu-El is employed by the State as a Support



Enforcement Assistant Supervisor within the Department of Human Resources.

7. The named Plaintiffs represent approximately 40,000 similarly-situated State employees, all of whom will be required to work 40 hours for 35 and 1/2 hours of pay as a result of the Order. Joinder of this number of Plaintiffs is impracticable.

8. There are questions of law and fact common to the class, specifically:

(a) All the individual Plaintiffs and potential class members are affected by the same Order;

(b) All the individual Plaintiffs and potential class members are classified employees;

(c) All the individual Plaintiffs and potential class members are entitled to the same rights under the Constitution of Maryland, the Maryland Declaration of Rights, the Merit System Law, the

Annotated Code of Maryland and COMAR; and

(d) The Defendants' defenses, if any, will be the same as to all Plaintiffs in the class.

9. The claims and defenses of the representative parties are typical of the claims and defenses of the class.

10. The representative parties will fairly and adequately protect the interests of the class. -

11. The questions of law common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

12. The Defendant, William Donald Schaefer, is the Governor of Maryland ("the Governor"), the Chief Executive of the State of Maryland and the source of the Order.

13. The State of Maryland ("the State") is the employer of all of the Plaintiffs.

14. Hilda E. Ford is the Secretary of Personnel ("the Secretary"), and is charged with the duty of administering personnel policy in the State of Maryland, and is charged with the implementation of the Order.

15. Collectively, the Defendants are all persons known to the Plaintiffs who have or claim any interest which would be affected by the declaratory decree sought to be obtained in these proceedings.

**B. Legal and Factual Background**

16. The Code of Maryland Regulations ("COMAR defines the workweek as work days, and at least 35 1/2 hours up to a maximum of 40 hours." The appointing authority has the authority to designate the workweek for all positions under the appointing authority's control. COMAR

06.01.01.42.A.(1). The Governor is not the appointing authority within State Agencies or Departments. (See, Md. Health General Code Ann. §2-103(b)(3) (Health and Mental Hygiene the Department Secretary); Md. Ann. Code Art. 27 684(b) (Public Safety and Correctional Services - the Warden or Superintendent)).

17. With few exceptions, the appointing authorities for every Executive Branch department have designated 35-1/2 hours as the normal workweek for employees under their authority. This has been the policy of the State for many years.

(a) Exhibit B - Department of Public Safety and Correctional Services;

(b) Exhibit C - Department of Human Relations.

(c) Exhibit D - Public Defender's Office.

(d) Exhibit E - Department of Health and Mental Hygiene.

18. The Annotated Code of Maryland, Article 100, §76, provides, in part:

(a) Employees generally. - Except as otherwise provided in this section, every State employee who works in excess of the normal work week for his department, bureau, board, commission or agency shall receive extra compensation for such hours worked in excess of that time. The amount of compensation for such excess hours shall be computed in the following manner

(1) Payment for time worked in excess of the position's normal workweek but not in excess of 40 hours shall be made at the employee's usual hourly rate or rates.

(2) Payment for time worked in excess of 40 hours in any week shall be made at time and one-half the employee's regular hourly rate. The regular hourly rate for the week is determined by dividing the total regular pay for all hours worked in the week by the total hours worked.

19. Through Article 106, §76, the State is required to pay State employees their usual hourly rate for all those hours worked in excess of normal workweek, 35.5 hours.

20. By virtue of the Order, the Governor is attempting to circumvent this law, and require State employees to work an additional 4.5 hours, without paying the additional regular rate as required by Art. 100, §76.

21. The Governor has no power, absent legislative approval, to make changes that are inconsistent with existing law, without specific legislative authorization. Const. of Md., Art. II, § 24.

22. The Governor has not sought legislative approval of the order.

23. The Order completely disregards the law of wages and overtime for State employees, found in Article 100, §76.

24. The Order deprives the Plaintiffs of their property in violation of the United States Constitution, 14th Amendment, the Maryland Declaration of Rights, Art. 8, 9 and 24, and the Constitution of Maryland, Art. II §24.

### III. CLAIM FOR DECLARATORY RELIEF

25. The Plaintiffs incorporate and allege the facts stated in Paragraphs 1 through 24 as if fully set out and alleged herein.

26. This action is brought to obtain declaratory and other relief pursuant to the provisions of the Annotated Code of Maryland, Cts. & Jud. Proc. Art. § 3-401, et seq., Md. R. 2-231 and the Public General laws of the State of Maryland.

27. This action is brought to determine whether the Governor's Executive Order 01.01.1991.15 requiring State employees to work 40 hours per week for 35

and 1/2 hours of pay, is a valid and lawful Order under the Constitution, Declaration of Rights, laws and regulations of the State of Maryland and the United States.

28. An actual controversy exists between the Plaintiffs and the Defendants on the issue of whether the Order complies with the United States Constitution, the Maryland Declaration of Rights, the Maryland constitution, and the Public General Laws of the State of Maryland.

29. A declaration by this Court will serve to terminate uncertainty and controversy giving rise to this proceeding, specifically, Plaintiffs assert that their salaries and hours of work are controlled by law, and the Defendants seek to change the salaries and hours in violation of the laws of the State of Maryland.

WHEREFORE, the Plaintiffs request



that this Honorable Court declare:

(A) That the Executive Order, No. 01.01.1991.15 be declared void ab initio;

(B) That the Plaintiffs, if they are to work in excess of 35-1/2 hours per week, be fully entitled to and receive the wages and benefits guaranteed them by law and regulation;

(C) For the costs and expenses, including attorney's fees incurred in bringing this action; and

(D) For such other and further relief as may be just and equitable in support of the Plaintiffs' cause.

#### **IV. VIOLATION OF PLAINTIFFS'** **CIVIL RIGHTS**

30. The Plaintiffs incorporate and allege the facts set forth in Paragraphs 1 through 29 as if fully stated herein.

31. The Plaintiffs, as classified employees, have a property right in their

employment. This property cannot be taken from them without due process of law, in accordance with the United States Constitution, 5th Amendment, the Maryland Declaration of Rights, Art. 24, Annotated Code of Maryland, Art. 100, §76 and COMAR 06.01.01.42.

32. The Defendants seek to deprive the Plaintiffs their wages by requiring them to work greater hours without additional pay or benefits.

33. The Maryland Declaration of Rights, Art. 8, guarantees that the legislative, executive and judicial powers of government will be separate and distinct and that no person exercising the function of one of those departments may assume or discharge the duties of any other. In enacting and attempting to enforce the Order, the Defendants, members of the Executive Branch of government, seek to execute legislative functions,

specifically the regulation of overtime pay in conflict with the legislature's prior actions under Art. 100, 76.

34. Article 9 of the Maryland Declaration of Rights guarantees that only the legislature has the power to suspend the laws of the State, or to grant that power; the Order seeks to suspend the laws of the State of Maryland without legislative grant.

35. Article 17 of the Maryland Declaration of Rights guarantees that the State shall not enact any retroactive laws.

36. Plaintiffs, having accepted jobs with compensation established on a 35 1/2 hour workweek, having worked at those jobs -- for many years, having made child care, home and family commitments based on the State's promise of a 35 1/2 hour workweek, have acquired a vested right under existing law, regulation and policy in the

continuation of a 35 1/2 hour workweek, and compensation for hours worked in excess of 35 1/2 hours.

37. The Order, requiring Plaintiffs to work 225 extra hours per year without additional compensation deprives the Plaintiffs of their vested employment rights, and hence violates the Maryland Declaration of Rights, Art. 17, and the United States Constitution, Article I, §10.

WHEREFORE, the Plaintiffs request:

- (A) Damages in an amount to be determined at trial;
- (B) Costs and attorney's fees incurred in bringing this action; and
- (C) For such other and further relief as the nature of their cause may require.

#### **V. BREACH OF CONTRACT**

38. The facts and allegations stated

in Paragraphs 1 through 37 are alleged and incorporated as if fully stated herein.

39. The Plaintiffs were offered, and accepted positions with a salary based on a 35-1/2 hour workweek, with overtime or compensatory time, as required by law, for all hours worked in excess of 35-1/2 hours.

40. For over many years, the Plaintiffs have worked a 35-1/2 hour week, and been paid overtime or compensatory time for all those hours worked in excess of 35-1/2 hours per week.

41. The Plaintiffs have relied to their detriment on the promise of the Defendants that they would be required to work only 35-1/2 hours per week, and many of the Plaintiff class have built lives, homes and families, child-care or parent-care arrangements based on the promises by the State.

42. The Plaintiffs by virtue of the

laws of the State of Maryland have an expressed and implied contract of employment with the State that guarantees their salary, wages and hours of work under the terms set out in Art. 64A, Art. 100 and COMAR.

43. The Defendants' action increasing the hours without a proportionate increase in salary constitutes a breach of the Plaintiffs' contract.

44. As a result of this breach, the Plaintiffs will sustain monetary and non-monetary damages.

WHEREFORE, the Plaintiffs request:

(A) Damages in an amount to be determined at trial;

(B) Costs and attorney's fees incurred in bringing this action; and

(C) For such other and further relief as the nature of their cause may require.

VI. VIOLATION OF RULE-MAKING  
AUTHORITY

45. The facts stated in Paragraphs 1 through 44 are incorporated and alleged as if fully set forth herein.

46. The workweek for State employees is described in regulation, specifically COMAR 06.01.01.42A.

47. The regulations found in COMAR have been established through the rule-making authority granted by the Legislature to the Administrator of State Documents and the Joint Committee on Administrating, Executive and Legislative Review. Md. St. Gov't Code Ann. §10-101 et. seq.

48. Regulations may be changed or adopted only after review by the Attorney General, publication in the Maryland Register, notice of proposed adoption, opportunity for public comment, public hearing and other requirements under Md. St. Gov't Code §10-101 et. seq.

49. The Governor has not subjected

his proposed changes to COMAR to the rule-making procedure established in the State Government Article.

50. By enacting the order, the Governor has attempted to circumvent the rule-making procedure established by the Legislature, in violation of the Maryland Declaration of Rights, Articles 8 and 9.

WHEREFORE, the Plaintiffs request that this Court:

(A) Declare the Order void ab initio;

(B) Award the Plaintiffs damages in an amount to be determined at trial;

(C) Award the Plaintiffs attorney fees and costs incurred in bringing this action; and

(D) For such other and further relief as the nature of this case may require.

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J. EDWARD DAVIS

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J. CALVIN JENKINS, JR.



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STEPHEN B. AWALT

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DAVIS & JENKINS  
409 Washington Avenue, Suite 909  
Towson, Maryland 21204  
(301) 494-9009

ATTORNEYS FOR PLAINTIFF

APX. 59.

IN THE COURT OF APPEALS  
FOR THE STATE OF MARYLAND

THE MARYLAND  
CLASSIFIED  
EMPLOYEES  
ASSOCIATION,  
INC., et al.

\* Sept. Term

\* Misc. No.

\*

Plaintiffs

\*

\*

V.

\*

GOVERNOR WILLIAM  
DONALD SCHAEFER,  
et al.

\*

\*

Defendants

\* \* \* \*

AMERICAN FEDERATION  
OF STATE, COUNTY AND  
MUNICIPAL EMPLOYEES,  
COUNCIL 92, MARYLAND  
STATE EMPLOYEES  
UNION, et al.

\*

\*

\*

\*

Plaintiffs

\*

V.

\*

GOVERNOR WILLIAM  
DONALD SCHAEFER,  
et al.

\*

\*

Defendants

\*

PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

Plaintiffs, Maryland Classified

Employees Association, Inc., et al., and AFSCME, et al. request this Court to issue a Writ of Certiorari.

The Case in The Lower Court

The case in the lower court was designated

Maryland Classified Employees Association, Inc. et al., Plaintiffs v. Governor William Donald Schaefer, et al., Defendants and American Federation of State, County and Municipal Employees, Council 92, Maryland State Employees Union, et al., Plaintiffs v. Governor William Donald Schaefer et al., Defendants in the circuit Court for Anne Arundel County, consolidated case numbers 3116305 and 3116596.

Decision by The Court of Special Appeals

The Judgment sought to be reviewed was entered on July 9, 1991 by the Circuit Court for Anne Arundel County. The

Plaintiffs, Maryland Classified Employees Association, et al. filed an Appeal to the Court of Special Appeals on July 94, 1991. The case has not been decided by the Court of Special Appeals and the is the subject of this Petition.

Questions Presented for Review

1. Whether the Governor's Executive Order

requiring the Plaintiffs to work a 40 hour work week without additional compensation violates the doctrine of Separation of Powers.

2. Whether the Governor's Executive Order requiring the Plaintiffs to work a 40 hour work week without additional compensation violates the Plaintiffs' contract rights.

3. Whether the Governor's Executive Order requiring Plaintiffs to work a 40 hour week without additional compensation violates the

Plaintiffs' procedural due process rights.

4. Whether the Governor's Executive Order requiring Plaintiffs to work a 40 hour work week without additional compensation violates the State's Pay Plan Law.

Pertinent Legal Provisions

1. Constitution of Maryland, art. 1.

2. Constitution of Maryland, art. 2,  
§24.

3. Annotated Code of Maryland, art.  
100,  
§76.

4. Maryland State Government Code  
Annotated §7-213.

5. Maryland Declaration of Rights,  
art. 8, 9.

6. Code of Maryland Regulations  
06.01.01.42.

7. Maryland Declaration of Rights,  
art. 17.

8. United States Constitution, art.

I, §10.

9. Maryland Code, art. 64A, §27.

Statement of Facts

See the Stipulation of Facts agreed to by the parties, attached hereto as Exhibit A.

Argument

The Plaintiff, MCEA, et al. believes that this case is of monumental significance to the State because the Court's ruling will impact on tens of thousands of State employees and their families. The issues presented concern the MCEA's contention that the Defendants have violated provisions of the Constitution of Maryland, the Maryland Bill of Rights, Code of Maryland Regulations and various statutes of the Annotated Code of Maryland, as well as the United States Constitution. The Plaintiff, MCEA, et al. avers that the decision of the trial court misconstrued

the Defendant Schaefer's powers under the doctrine of Separation of Powers mandated by the Constitution of Maryland, failed to recognize the contractual relationship between the individual Plaintiffs and the Defendants and failed to comply with the Regulations of the State Pay Plan, and was otherwise in error. The issues presented on Appeal are of such significance that the Court of Appeals of Maryland should directly consider this Appeal.

WHEREFORE, the Plaintiffs, MCEA, et al., Petition this Court to grant a Writ of Certiorari in this case.

RESPECTFULLY SUBMITTED,

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EDWARD DAVIS

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STEPHEN B. AWALT  
409 Washington Ave., Suite 909  
Towson, Maryland 21204  
(301) 494-9004  
ATTORNEYS FOR MCEA, et al.

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WILLIAM H. ENGLEMAN  
10th Floor-Sun Life Bldg.  
20 S. Charles Street  
Baltimore, Maryland 21201  
ATTORNEYS FOR AFSCME, et al.

APX. 66.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 9th day of July, 1991, that a copy of the foregoing Writ of Certiorari was mailed postage prepaid to: David Dufee, Department of Personnel, Suite 1009, 301 W. Preston Street, Baltimore, Maryland 21201, Judson Garrett, Deputy Attorney General, 200 St. Paul Place Baltimore, Maryland 21202 and William Englemar, 20 S. Charles Street, 10th Floor, Baltimore, Maryland 21201.

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EDWARD DAVIS

APX. 67.

EXECUTIVE ORDER

01.01.1991.15

40 Hour Work Week

(Amends 01.01.1991.01)

WHEREAS, Executive Order 01.01.1991.01 ,  
issued on January 8, 1991,  
proclaimed a standardized work  
week of 40 hours for State  
employees; and

WHEREAS, The federal government, most  
private and public sector  
employees, and one-third of  
State employees presently work  
40 hours a week; and

WHEREAS, A 40 hour work week for State  
government will achieve cost  
containment through increased  
productivity and employee  
development; and

WHEREAS, During these difficult fiscal  
times, it is prudent to search  
for savings for the taxpayers of  
this State; and

WHEREAS, The transition to a standardized  
40 hour work week for State  
employees could involve changes  
and adjustments to daily  
schedules and routines,  
particularly child care,  
transportation, employment, and  
family responsibilities; and

WHEREAS, These considerations in addition  
to many question involving the  
implementation of Executive  
Order 01.01.1991.01 at the State  
level, make it prudent to delay  
the implementation of the 40

hour work week so that, when effective, the transition will not cause hardship or inconvenience;

NOW, THEREFORE,

I, WILLIAM DONALD SCHAEFER, GOVERNOR OF THE STATE OF MARYLAND, BY VIRTUE OF THE AUTHORITY VESTED IN ME BY THE CONSTITUTION AND LAWS OF MARYLAND, HEREBY PROCLAIM THE FOLLOWING ORDER AMENDING EXECUTIVE ORDER 01.01.1991.01:

A. The normal work week for State employees shall be 40 hours effective [February 6, 1991] JULY 1, 1991.

B. The Secretary of Personnel and the appointing authorities shall take all actions necessary or desirable to implement this directive.

GIVEN Under My Hand and the Great Seal of the State of Maryland, in the City of Annapolis, this 27th day of February 1991.

\_\_\_\_\_  
WILLIAM DONALD SCHAEFER, GOVERNOR /s/

ATTEST:

\_\_\_\_\_  
WINFEILD M. KELLY, /s/  
SECRETARY OF STATE

Annotated Code of Maryland, Art. 100 §76.

Overtime Compensation of Employees.

(a) **Employees Generally** - Except as otherwise provided in this section, every State employee who works in excess of the normal work week for his department, bureau, board, commission or agency shall receive extra compensation for such hours worked in excess of that time. The amount of compensation for such excess hours shall be computed in the following manner:

(1) Payment for time worked in excess of the position's normal work week but not in excess of 40 hours shall be made at the employee's usual hourly rate or rates.

(2) Payment for time worked in excess of 40 hours in any week shall be made at time and one-half the employee's regular hourly rate. The regular hourly rate for the week is determined by dividing the total regular pay for all hours worked in the week by the total hours worked.

(3) For employees of hospitals and domiciliary care facilities for the ill, aged, or handicapped, payment may be computed on the basis of an 80-hour biweekly period in lieu of a 40-hour workweek. Payment shall then be made at time and one-half the employee's regular rate for all hours worked in excess of 80 hours in the biweekly period, or at time and one-half the regular hourly rate for all hours worked in excess of 8 hours each day, whichever is greater. The

regular hourly rate is determined as in paragraph (2), but used for the two week period.

(4) The Secretary of Personnel may, by regulation consistent with the Fair Labor- Standards Act, provide for payment to be made in compensatory time rather than by monetary payment.

(5) Regulations adopted under paragraph (4) of this Subsection shall include:

(i) Provisions which specify the ability of the employee to choose, prior-to the performance of the work and after notifying the appropriate supervisor, whether to receive compensatory time for the approved overtime work. If the employee does not choose to receive compensatory time, the employee will - automatically receive overtime payment calculated under this section for approved overtime work.

(ii) Provisions specifying that compensatory time received by an employee under this section, in lieu of a

monetary overtime payment, may not be less than one and one-half hours of compensatory time for each hour of overtime worked.

(b) **Payment** - A State employee who earns overtime pay shall receive that overtime pay no later than the day of payment of the 2nd pay period following the pay period during which the overtime pay is earned.

(c) **Supervisory Employees** - The Secretary of Personnel is authorized and empowered to designate those bona fide administrative, executive, and professional employees who shall not be eligible to receive overtime compensation but who may be compensated by compensatory time. The Secretary of Personnel is authorized and empowered to adopt and promulgate reasonable regulations to prevent an abuse of this section by the granting of unnecessary and unwarranted overtime or by the failure to grant overtime compensation when the employee is eligible to receive it under the provisions of this section.

(d) **Exceptions** - The provisions of this section shall not apply to the law enforcement personnel of the Maryland Alcohol and Tobacco Tax Enforcement Unit.

(1) An agency may adopt alternate work schedules as permitted by the Fair Labor Standards Act for the purpose of determining overtime compensation for its law enforcement employees or fire fighters.

(2) A law enforcement employee of the Maryland State Police holding a noncommissioned rank or a law enforcement employee of the Department of Natural Resources holding the rank of Sergeant or below or Park Ranger III or below, who is called out to duty on a regularly scheduled off-duty day or during a regularly scheduled on-duty day after going off duty shall be compensated at one and one-half times the employee's regular hourly rate. This payment shall be made for not less than four hours time on any day the employee is called out. A law enforcement employee of any other State agency who is called out to duty on a regularly scheduled off-duty day shall be compensated at one and one-half times the employee's regular hourly rate for the time worked.

(3) A law enforcement employee of the Maryland State Police holding a noncommissioned rank or a Natural Resources police officer of the rank of Sergeant or below who appears in court on official duty on a regularly scheduled off-duty day or during a regularly scheduled on-duty day after going off duty shall be compensated at one and one-half times the employee's regular hourly rate. This payment shall be made for not less than two hours time on any day the employee is called out.

(e) **Law Enforcement Employees - (1)**  
Law enforcement employees and cadets of the Maryland State Police who work in excess of their normal 8-hour daily workday and law enforcement employees of any other State agency who work in excess of their normal 8-hour daily workday shall receive overtime compensation at



one and one-half times their respective hourly wage rates,

(2) The maximum yearly overtime to be paid any 1 employee of the Maryland State Police or the Department of Natural Resources is as follows:

Cadet, Maryland State Police	Unlimited
and Department of	
Natural Resources	
Trooper, Trooper First Class,	
Natural Resources	
Officer and	
Officer,	
First Class	Unlimited
Corporal and Natural	
Resources Corporal	Unlimited
Sergeant and Natural	
Resources	
Sergeant	Unlimited
1st Sergeant	Unlimited
Park Ranger I	Unlimited
Park Ranger II	Unlimited
Park Ranger Ill	Unlimited

(3) Funds, other than those designated out of the general funds of the State, which are allocated for federal, county, or municipal sources, or from State special fund sources, may be used to pay overtime to law enforcement employees and cadets of the Maryland State Police holding a noncommissioned rank or of the Department of Natural Resources whether or not the maximum limits for each rank listed above have been paid. A commissioned officer in the State Police or an officer of the Department of Natural Resources above the rank of Sergeant or above the rank of Park Ranger Ill is not entitled to



receive overtime compensation in any case, except that compensatory time may be awarded for overtime performed by a commissioned officer of the State Police or of the Department of Natural Resources in excess of 30 hours per fiscal year.

(4) If any employee's rank is changed during the year, the employee shall be entitled to the higher of the two applicable yearly overtime maximums for the duration of the year. Overtime payments may not be taken into consideration for retirement or pension purposes,

(5) Any law enforcement employee of the Department of Natural Resources who for any reason works any overtime, whether or not the officer is paid monetary overtime compensation for that time, shall be considered to be employed by the State during those hours for purposes of all other employee entitlement. Commissioned officers may be awarded compensatory time for overtime performed in excess of 30 hours per fiscal year.

(6) Law enforcement employees of the Maryland State Police holding a noncommissioned rank who are required to work on any portion of the New Year's Day, Thanksgiving Day, or Christmas Day holiday shall receive overtime compensation that is computed by:

(i) Re-ceiving a  
compensa-tory day  
off; and

(ii) Dividing the normal daily rate of compensation by the number of hours in the workday and multiplying the resulting quotient by one and one-half times the number of hours worked during the holiday.

APX. 76.

Annotated Code of Maryland Art. 64A, §56.

Sovereign immunity; satisfaction of awards.

(a) **"State" Defined** - In this section the "State" includes any officer, department, agency, board, commission, appointing authority, or, other unit of State government.

(b) **Defense of Sovereign Immunity Unavailable** - The defense of sovereign immunity may not be available to the State, unless otherwise specifically provided by the laws of Maryland, in any administrative, arbitration, or judicial proceeding held pursuant to this article, to the rules and regulations of the Secretary of Personnel, or the personnel policies, rules, and regulations for classified employees of the University of Maryland System involving any type of employee grievance or hearing, including, but not limited to, charges for removal, disciplinary suspensions, involuntary demotions, or re-classifications. The defense of sovereign immunity is not available to the State with regard to a salary award in an employment discrimination case under SS 16 of Article 49B of this Code.

(c) **Funds Provided for Satisfaction of Awards** - The Governor shall provide in the annual State budget adequate funds for the satisfaction of any final monetary or benefit award or judgment, which has been rendered in favor of the person against the State in any administrative, arbitration, or judicial proceeding.

**(d) Awards Which Have Not Been Satisfied** - Awards under this section which have not been satisfied pursuant to subsection (e) of this section, shall be reported to the Comptroller of the Treasury, who shall maintain and report annually to the Governor an accounting of existing awards. Upon appropriation of funds by the legislature, the Comptroller of the Treasury shall satisfy existing awards in order of date of award.

**(e) Timeliness of Satisfaction** - If the State has sufficient funds available to satisfy any award under this section at the time the award is rendered, the award shall be satisfied as soon as practicable but not more than 20 days after the award becomes final.

APX. 78.

Code of Maryland Regulation,  
06.01.01.42A.

Preface

**Paragraph One.** This regulation applies to all employees and appointed officials except employees of the offices of clerks of the court and registers of wills.

**Paragraph Two.** Faculty and administrative employees of the University of Maryland and colleges under the authority of the Board of Trustees of State Colleges are encompassed under the existing policies and procedures established by these authorities. Any amendments or changes to these policies and procedures shall be filed with, and approved by, the Secretary of Personnel.

**Paragraph Three.** An employee may not be granted provisions of leave in tile establishment of official records which would exceed the maximum earnings rates and accumulation of those stipulated in Article 64A and this regulation for any given time period.

(a) Workweek, Overtime, and Compensatory Leave of 5 work days, and at least 35 1/2 hours up to a maximum of 40 hours.

(b) The part-time workweek consist, of at least 2 work days, and at least 17 3/4 hours up to a maximum of 32 hours.

(c) The workweek begins on Wednesday and ends on the following Tuesday, both days inclusive. The appointing authority

may designate a different 7-day period for the purpose of computing overtime.

(d) The appointing authority shall designate the workweek for all positions under the appointing authority's control, and shall file the designation with the Secretary. The designation of work week hours is effective until the appointing authority changes it.

(e) The appointing authority may designate a full-time workweek which consists of fewer than 5 days, and at least 71 hours in a 2-week pay period up to a maximum of 80 hours in a 2-week pay period, and which is known as a compressed work week. The appointing authority shall submit to the Secretary a request for approval of the designation together with the reason for the designation.

(f) Work in excess of a position's normal workweek shall be compensated by overtime payments in accordance with Regulation .14D of this chapter or may be compensated by compensatory leave.

**(2) Work Time.**

(a) Work time includes time during which an employee:

(i) Is required to be on duty;

(ii) Is on paid leave;

(iii) Participates in training activities as part of his job duties;

(iv) Is on the employer's premises and is on call and waiting for work;

(v) Is not on the employer's premises, but is on call and waiting for work, and the employee's personal activities are substantially restricted;

(vi) Is changing into and removing program specified clothing and equipment necessary for the performance of his job activities;

(vii) Participates in activities that are job-related immediately before the beginning of his shift or immediately after the end of his shift;

(viii) Travels to and from work when he has been recalled to work by the appointing authority or his designated representative after the employee has completed his normal workday; and

(ix) Travels between his home and a work site other than his assigned office, in accordance with the Standard Travel Regulations.

(b) With the exception of those categories of employees cited in the Fair Labor Standards Act, 29 U.S.C., SS201, et seq., an appointing authority may exclude meal periods and a maximum of 8 hours sleep from consideration as work time for employees who are on duty for at least 24 hours. If the employee's sleep is interrupted for the performance of work so that he is not able to sleep continuously for at least 5 hours, the appointing authority shall consider the entire period of sleep up to a maximum of 8 hours as work time.

**(3) Authorization to Work Overtime.**

(a) An appointing authority or his designated representative may authorize an employee to work periods of time in excess of the employee's normal workweek, dependent upon workload demands, and shall assure that the authorization is in writing.

(b) The appointing authority shall assure that the original written authorization to work overtime in accordance with SSA(3)(a), of this regulation, is retained by the agency for auditing purposes.

**(4) Compensatory Leave.**



(a) Execu-tive, administra-tive, and profes- sional employees, whose classifications are not on the list of employees to receive overtime payments, are eligible to earn compensatory leave.

(b) Compen-satory leave, if granted, may be used by the employee within 1 year after it has been earned, or shall be forfeited.

**B. Eligibility for Earning Leave.**

(1) Leave time is earned by:

(a) Full- time em-  
ployees;

(b) Part- time em-  
ployees;

APX. 83.

DEPARTMENT OF PERSONNEL

CODE OF MARYLAND REGULATIONS, 06.01.01.14D

Overtime Pay; Exceptions.

(1) List of Employees to Receive Overtime Payments. The Secretary shall determine the classifications for which overtime payments are mandatory, and shall maintain a list of those classifications. The Secretary shall provide appointing authorities with copies of that list. Overtime cash payments may not be made to executive, administrative, or professional employees except in instances of a bona fide emergency directly affecting public safety, as determined by the appointing authority and approved by the Secretary. In these bona fide emergency circumstance, the Secretary shall specify the time period during which cash overtime payments are authorized, the payment rate, and such other limitations or requirements as the Secretary deems necessary.

(2) Computation of Overtime Payments.

(a) The appointing authority shall assure that overtime payments are made at straight time for time worked up to and including 40 hours per week.

(b) The appointing authority shall assure that overtime payments are made at time and one-half the regular hourly rate for time worked in excess of 40 hours per week. The regular hourly rate is determined by dividing total straight time earnings, including shift differential, by the total number of hours worked.

(c) The appointing authority of a hospital or domiciliary care facility for the ill, aged or handicapped where the operations do not lend themselves to the normal work week as described in Regulation .42A(1)(a), of this chapter, shall assure that overtime payments are made as the greater of either of the following:

(i) Time and one-half the regular hourly rate for all hours worked in excess of 80 hours in the 14-day period; or

(ii) Time and one-half the regular hourly rate for all hours worked in excess of 8 hours for each day worked in the 14-day period.

(d) An appointing authority may adopt alternate work schedules as permitted by the Fair Labor Standards Act, 29 U.S.C., §201, et seq., for the purpose of determining overtime compensation for the appointing authority's law enforcement employees or fire fighters.

. . .

